IN THE

# Supreme Court of the United States

**October Term, 1951**

**No. 774**

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OXNARD CANNERS, INC., a corporation, and JAMES L. SMITH,

*Petitioners.*

*against*

THOMAS W. BRADLEY,

*Respondent.*

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## PETITIONERS' REPLY BRIEF

### I

Respondent does not question the correctness of the legal principles stated in Petitioners' Brief, nor the statements of fact, save one minor fact to be hereinafter referred to. Respondent urges that no special and important reasons appear for the granting of the writ. The Petition herein presents some of the most important points in the law of patents, to wit:—

(a) Is the determination of invention a matter of law?— as to which the First Circuit is awaiting a decision of this Court (Petition, pp. 15, 16, Questions No. 1 and No. 4), and, in the absence of which, the first Circuit stated it was unable to aid in obtaining a uniform application of the patent law.

(b) Is the determination of a true combination a matter of law or a matter of fact? (Petition, pp. 18-29, Question No. 2).

(c) Is it essential to hold presence of invention even if a true combination has been found to exist? (Petition, p. 16, Question No. 3).

(d) Is it good law to consider a patent claim for an entire machine to be a combination claim, instead of voiding such an entirety claim for overclaiming (Petition, p. 17, Question No. 5).

These questions go to the life of our practical patent law and enter into the entire substance of our industrial life.

The minor statement of fact questioned by Respondent (Resp. Br., pp. 3 and 4) is that the machines were "used only in the Ninth Circuit and foreign countries" (Petition, p. 9). In the record appears (testimony of James L. Smith), at page 208: "Q. Well, your device has met with commercial success? A. Yes, we have them all over Monterey and down south and in foreign countries." (Elsewhere, San Diego, Cal. is referred to, R. p. 113, which is "down South" from San Francisco, Cal.)

As there is no evidence showing use anywhere else, it was entirely correct to say that such machines were "used only in the Ninth Circuit and in foreign countries."

The remainder of Respondent's brief endeavors to support the correctness of the judgment below by general conclusions. We are not permitted at this time to enter into the merits of the validity issue, except to say that Respondent seems to construe *Cantrell* v. *Wallick*, 117 U. S. 689, 29 L. ed. 1017 (1886), as the Court of Appeals may have done, to wit.:—that "a new or improved result is patentable" (R., pp. 279, 280), to mean that an "improved result" is an old result improved. From the context of the opinion of *Cantrell* v. *Wallick* which speaks only of a new result, a "new result" and "an improved result" in the part quoted from the opinion below can only be identical or synonymous.

The statement (Res. Br., p. 4) that the machines are built locally in California "by the Petitioners" emphasizes the paralysis in the industry if the judgment be allowed to remain permanent, and fully supports Petitioners' Reason (Petition, p. 9).

## II

Respondent refrains from even mentioning in his Brief that the accused machine, held by the courts below to infringe the Bradley patent, was indisputably constructed in accordance with the patent issued to Lockwood and Petitioner Smith and, of course, makes no comment on the legal implications arising therefrom and from the fact that both applications were co-pending in the Patent Office for over three years, and on the absence of legally sufficient evidence in the record to overcome the presumption of non-identity of the respective inventions, or to the evidence contrary to infringement (R. p. 228).

That the Smith-Lockwood commercially successful machine is radically different from the Bradley machine, of which some were used by one concern (R. pp. 67, 68), is apparent from a comparison of the two structures and the descriptions thereof in the respective patents. The essential point of difference is the structure employed at the respective eviscerating suction points. The Bradley machine employs a rotatable flat disk, positioned and rotating in a vertical plane, in which disk are holes, to the upper one of which a decapitated fish is moved by a horizontal conveyor, where with reference to the said hole, suction on the viscera of the fish, as in the eclipse of the moon, waxing, full, and waning, takes place (R. pp. 220, 225). The fish is cut short to prevent being slidingly carried along by this arcuately rotating hole or to enter it except by applied suction waxing, full, and waning. This cannot clean all fish (R. p. 213). The Smith-Lockwood structure employs a rotating cylinder positioned with holes rotating horizontally in the plane of

the horizontally moving conveyor; and the point of contact of that rotating cylinder with the horizontally moving decapitated fish is and can only be tangential (R. p. 224), giving a complete registration of the hole with the viscera, the fish viscera entering into that hole, the fish being cut long for that purpose (R. pp. 218, 219).

The principles of physics and mechanics employed in the respective machines are obviously different as are the operation and practical consequences thereof—witness the necessity of a clamp on the Bradley machine to hold down the fish upon contact with the rotating disk, and no such clamp is needed or used on the Smith-Lockwood machine. Since in the latter machine the contact of the decapitated fish is tangential to the revolving cylinder, the point of contact is single and complete, affording a complete vacuum for the eviscerating process, without marring or messing up the fish. As the disk type of Respondent was 25% less efficient than the cylinder type of Petitioner (R. p. 213), the industry accepted the cylinder for its efficiency and rejected the disk for the opposite reason. The viscera is spaced a quarter of an inch back from the disk (R. p. 73); but on the cylinder, the viscera protrudes an inch and a half beyond the conveyor and thus into the hole of the cylinder when the hole is tangential to the viscera (R. p. 219). And the Patent Office likewise recognized this vital feature in granting the Smith-Lockwood patent application, notwithstanding its copendency with the Bradley application for over three years.

The evidence most favorable to Respondent, appearing anywhere in the Record, that the Smith-Lockwood machine infringed the Bradley patent is quoted in the opinion of the Court of Appeals (R. pp. 274-275); but such evidence, it is submitted, is legally insufficient. *McRoskey* v. *Braun Mattress Co.* (9 Cir. 1939), 107 F. 2d 143, 146, *Metropolitan R. R. Co.* v. *Moore* (1887), 121 U. S. 558, 30 L. ed. 1022, 1025.

Absent any conflict of crucial legally sufficient evidence of infringement to overcome the said presumption of the non-infringement of the Bradley patent by the Smith-Lockwood patent structure, the question of infringement is still solely one of law, reviewable by this Court (*Sanitary Refrigerator Co.* v. *Winters* (1929), 280 U. S. 30, 36, 74 L. ed. 147, 152).

June 2, 1952.

Respectfully submitted,

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